

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RESOURCES PROTECTION
COUNCIL, CENTER FOR BIOLOGICAL
DIVERSITY and LAURA GAUGER,

Plaintiffs,
-vs-

Case No. 11-CV-45-BBC

FLAMBEAU MINING COMPANY, INC., Madison, Wisconsin
May 23, 2012
Defendant. 9:03 a.m.

* * * * *

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF COURT TRIAL
MORNING SESSION
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB,

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11 Also present: Fred Fox

12 * * * * *

13 **I-N-D-E-X**

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1 (Call to order)

2 THE CLERK: Case Number 11-CV-45-BBC.

3 *Wisconsin Resources Protection Council et al. v.*

4 *Flambeau Mining Company* is called for third day court
5 trial. May we have the appearances, please.

6 MS. MCGILLIVAY: Good morning, Your Honor. Pam
7 McGillivray, James Saul, David Bender from McGillivray,
8 Westerberg & Bender. Kevin Cassidy from Lewis & Clark
9 Law School. At counsel table also with us on behalf of
10 plaintiffs is Attorney Christa Westerberg of
11 McGillivray, Westerberg & Bender. And Dan Mensher, also
12 from the Lewis & Clark Law School. And Marc Fink from
13 CBD, Center for Biological Diversity here for
14 plaintiffs.

15 THE COURT: Thank you.

16 MR. VAN CAMP: Good morning, Your Honor. Harry
17 Van Camp appearing on behalf of the defendant, Flambeau
18 Mining Company. Also appearing on behalf of the
19 defendant Flambeau Mining is Attorney Scott Paler.
20 Mr. Fred Fox appears on behalf of the mining company,
21 and we're assisted by Susan George.

22 THE COURT: Thank you.

23 MR. VAN CAMP: Yes. Thank you.

24 MS. MCGILLIVAY: Your Honor, before we call our
25 witness back, there's a preliminary matter that if we

1 could address, the fact stip. I've marked it as an
2 exhibit and provided defendants a copy. May I approach?

3 THE COURT: Um-hmm.

4 MS. MCGILLIVAY: This is a copy of the
5 stipulation and facts that was filed earlier by the
6 parties and I just marked it as Exhibit 89 and we would
7 offer it.

8 THE COURT: It will be received.

9 MS. MCGILLIVAY: Your Honor, I have one other
10 preliminary matter. Yesterday -- I guess I would ask
11 for reconsideration on offer of Exhibits No. 8 and No.
12 83, and I believe the Court's ruling on those went to
13 their relevance because they're documents that were from
14 2004. In the factual stipulation that the parties
15 agreed to, paragraphs 5-12 -- 5-15, excuse me, address
16 matters related to flow from the biofilter -- occasions
17 of flow from the biofilter and the exceedances or higher
18 than measuring of concentration of copper from the
19 biofilter outlet in that same time period.

20 The parties stipulated or plaintiffs proposed the
21 stipulated facts that were then agreed to by defendants
22 to show that the flow occurs, the surface water
23 connection of the water, and also the pollutant
24 transport. It was not for the purpose of showing dates
25 of liability. We understand the Court's ruling on

1 statute of limitation, but the flow of the water in that
2 area has not changed in the relevant time period for
3 this case. So we had proposed these stipulated facts.

4 Additionally, defendant's counsel had stipulated to
5 Exhibit 83's authenticity and admissibility on the first
6 day of trial and then yesterday moved on relevance
7 grounds to exclude it. Because we do believe that these
8 are relevant and that counsel had prior to yesterday
9 agreed to the relevance of these matters, would ask for
10 -- we ask to reoffer those two exhibits.

11 THE COURT: So that's 8 and 83?

12 MS. MCGILLIVAY: I think I might have
13 misspoken. I think it's 6, which is -- which were the
14 logs from Jana Murphy that were dated 10-15-02 to
15 9-15-04, and then a photograph which is dated April
16 19th, 2004, which is Exhibit 83, which coincides with
17 stipulated fact 5 and 6 which has to do with flow from
18 the biofilter on 4-19-04.

19 THE COURT: Mr. Van Camp.

20 MR. VAN CAMP: Yes. The stipulated facts
21 contain very specific limited amounts of information.
22 They talk about flow out of the biofilter on a
23 particular date and they talk about the concentration.
24 We stipulated to those facts. We did not stipulate to
25 all of the facts and information that was contained in

1 Exhibit 6. We didn't stipulate to the things
2 demonstrated by Exhibit 8.

3 And as far as the relevance of 83, at the time that
4 it was offered the witness hadn't presented evidence
5 that would make it relevant and we objected.

6 MS. MCGILLIVAY: Your Honor, if I may, I
7 believe 8 is already in evidence. That was Exhibit 6.

8 MR. VAN CAMP: I'm sorry if I said 8.

9 MS. MCGILLIVAY: I think I misspoke the first
10 time, I said 8. And Exhibit 83 is the stipulated
11 photograph on admissibility and authenticity that we
12 presented by stipulation the first day of trial.

13 MR. VAN CAMP: Okay.

14 THE COURT: 8 is in evidence. 6 are the field
15 logs for 2002 through 2004.

16 MS. MCGILLIVAY: Yes, Your Honor.

17 THE COURT: And why would all of those be
18 relevant?

19 MS. MCGILLIVAY: Your Honor, the time period
20 that we were discussing, I believe Mr. Cassidy was
21 discussing with Ms. Murphy during the examination,
22 coincided with the stipulated dates in 2004. And it
23 shows the flow and that she observed flow on that date
24 and that the flow patterns in the biofilter region have
25 not changed. And so we believe, because there has been

1 no change in the flow patterns at any time --

2 THE COURT: And where does the information that
3 there's been no change in the flow patterns come from?

4 MS. MCGILLIVAY: Well, I believe Dr. Coleman
5 testified to that and I believe that the documents that
6 post-date the Foth documents and other documents --

7 THE COURT: But that doesn't have anything to
8 do with her logs. The only thing in her logs that I
9 understand that would be relevant is the -- included in
10 the stipulation of facts at this time.

11 MS. MCGILLIVAY: I understood Ms. Murphy's
12 testimony to be that she observed flow on certain dates,
13 which would corroborate the surface water connection
14 throughout the region by her own personal observations
15 where she indicated high flow from various -- high flow,
16 medium flow or relative amounts of flow from various
17 monitoring locations we believe further substantiates
18 that there is a physical connection and a chemical
19 connection based on the results of the monitoring to
20 that area.

21 THE COURT: And the link is that you're saying
22 Dr. Coleman said that has not changed.

23 MS. MCGILLIVAY: Correct. And I believe that
24 the other admissions in documentary form from Foth and
25 the other witnesses for the company also indicate that

1 the flow patterns have not changed between 2004 and the
2 -- up until 2012. And it may or may not have changed
3 now, but I don't believe we have presented any evidence
4 anyway since 2012. The dates of the allegations of
5 violations go up through 2011.

6 THE COURT: Mr. Van Camp, anything else?

7 MR. VAN CAMP: I did not realize at the time I
8 objected to -- is it 83?

9 MS. MCGILLIVAY: Correct.

10 MR. VAN CAMP: I'll accept counsel's memory as
11 to whether that was among the photographs that was
12 discussed and stipulated to, and if Counsel represents
13 that that was one of them, then I would agree to its
14 admission.

15 THE COURT: All right. 83 then is received.
16 So that just leaves the field logs from 2002 to 2009 of
17 Ms. Murphy.

18 MR. VAN CAMP: Right. I don't believe any
19 comments by Dr. Coleman, he did not comment on her
20 logbooks. He didn't make any statement regarding
21 statements that she made, and I don't believe that he
22 testified that nothing had changed since the time of the
23 entry in that logbook. So I don't believe that that
24 helps and it certainly wasn't among the facts that we
25 were agreeing to stipulate to.

1 THE COURT: At this point I won't receive it.
2 If you can show me more information such as
3 Dr. Coleman's explicit reliance on her logbooks, I might
4 reconsider it, but not at this point.

5 MS. MCGILLIVAY: Thank you, Your Honor. Then
6 we will call Mr. Nauta back to the stand.

7 THE COURT: Thank you.

8 **ROBERT NAUTA, PLAINTIFFS' WITNESS, RESUMES STAND,**

9 MR. CASSIDY: Good morning, Your Honor.

10 THE COURT: Good morning.

11 CONTINUED DIRECT EXAMINATION

12 BY MR. CASSIDY:

13 Q Good morning, Mr. Nauta.

14 A Morning.

15 Q Yesterday during your testimony you talked about or
16 we had a discussion about topographic lines and topo
17 maps. Do you remember that? Do you recall that?

18 A Yes, I do.

19 Q And I believe you testified that some of the
20 evidence you reviewed as part of your investigation
21 included USGS maps as well as maps or diagrams produced
22 or generated by Foth; is that correct?

23 A Correct.

24 Q Do you still have a copy of your report?

25 A No. I gave that back to you at the end of the day.

ROBERT NAUTA - DIRECT

1 Thank you.

2 Q I handed you a copy of Exhibit 18, which is your
3 supplemental report in this case?

4 A Yes.

5 Q I put up on the screen figure -- is that figure --
6 was that figure included in your report?

7 A Yes, it was.

8 Q And why did you include it?

9 A It shows the -- it shows the slope from the
10 biofilter and it clearly identifies the channel of
11 Intermittent Stream C on it.

12 Q And can you show us what you're referring to? You
13 can -- if you touch the screen --

14 A Right.

15 Q -- and press firmly you can draw on it.

16 A Okay.

17 MR. VAN CAMP: Your Honor, I'm going to object
18 to this testimony. The figure that the witness is about
19 to testify about is a figure that comes from the post --
20 the proposed east Copper Park infiltration basins work
21 product, and this is again addressing the infiltration
22 -- the product that was excluded in our Rule 19 motion
23 related to the infiltration basins. This motion. And I
24 would ask that if the witness can testify about this,
25 that we be permitted to put our witnesses on to testify

ROBERT NAUTA - DIRECT

1 about what it shows as well, which will have to get into
2 the infiltration basins. This is not a cross section of
3 the biofilter.

4 MR. CASSIDY: Your Honor, proposed east -- this
5 document indicates existing conditions as of May of '08,
6 May of 2008, October 2009. The document does appear in
7 the May 2011 report. But all I'm asking -- and this is
8 something that Mr. Nauta relied on -- and all I'm asking
9 him about, I'm not asking him about infiltration, I'm
10 asking him about the slope, which is indicated here as
11 existing conditions during 2008 and 2009.

12 THE COURT: So you're suggesting this is what
13 Foth observed when it began to think about the
14 infiltration system that was later implemented.

15 MR. CASSIDY: Your Honor, I wouldn't speculate
16 as to what Foth observed. All -- this is a document
17 that Mr. Nauta relied on to show the slope coming out of
18 the biofilter.

19 THE COURT: But where did -- we have to talk
20 about Foth because apparently that's who drew up the
21 diagram and don't we need to know whether this was
22 exactly what was existing before Foth started the
23 project?

24 MR. CASSIDY: Well --

25 THE COURT: Otherwise why is it relevant?
ROBERT NAUTA - DIRECT

1 MR. CASSIDY: Well, it is relevant to the slope
2 coming out of the biofilter. We had a discussion about
3 topographic slopes yesterday.

4 THE COURT: I understand that this is an
5 accurate depiction of the conditions existing before any
6 work was done to change the existing situation. That
7 would be relevant. But I'm not sure this witness is the
8 one to supply that important link.

9 MR. CASSIDY: Well, Your Honor, maybe I'll ask
10 him if he knows. I don't know what his answer will be.
11 BY MR. CASSIDY:

12 Q Do you know if this figure represents conditions
13 that were existent at the biofilter basin before the
14 proposed infiltration basin was --

15 MR. VAN CAMP: Object -- sorry.

16 Q Before the proposed infiltration basin was begun?

17 MR. VAN CAMP: Objection. Foundation.

18 THE COURT: You have to show me that he has a
19 reason to know that.

20 BY MR. CASSIDY:

21 Q Okay. I'm going to move on in your report,
22 Mr. Nauta, to the next figure, which is Figure 1. Do
23 you see that?

24 A I do.

25 Q Is this a figure that you created?

ROBERT NAUTA - DIRECT

1 A Yes, it is.

2 Q And what are you or how are the sample -- what are
3 you generally illustrating in this figure?

4 A What I did was I reviewed the analytical data from
5 the -- from both Flambeau Mining Company and the DNR
6 that were collected. There were numerous other points,
7 but I was looking for points that had a good history of
8 frequent sampling, and so these points were selected. I
9 selected three points on the Flambeau River as well to
10 get an idea of natural background concentrations in the
11 surface water.

12 Q So where are the -- can you just tell us where the
13 sample points that you were talking about are reflected
14 on this figure, if you could identify them by number.

15 A Yes. I'll start at the upstream end of
16 Intermittent Stream C. SW-C3 is on the east side of
17 Highway 27 adjacent to the former rail spur. SW-C8 is
18 on the west side of Highway 27 in the -- in kind of a
19 drainage ditch area near where some excavated soil had
20 been stockpiled. BFSW-C2 is at the outfall of the
21 biofilter. SW-C5 is at the former farm culvert. SW-C1
22 is immediately south of Copper Park Lane.

23 Then on the Flambeau River up off the top of the
24 map is SW-1. There you go. And then farther downstream
25 is SW-2. And then SW-3 is where the intermittent stream

ROBERT NAUTA - DIRECT

1 discharges into the Flambeau River.

2 Q Now were these sample points that you picked to do
3 samples there?

4 A No.

5 Q How did you arrive at looking at this sampling
6 data?

7 A As I said, there were other points that only would
8 have a couple samples collected or maybe were -- they
9 discontinued sampling from them. I was looking for
10 sample points that had a long history of sample events,
11 of fairly regular sample events so that I could do a
12 better comparison from point to point.

13 Q In terms of where this data came from, again, where
14 did you get it?

15 A Most of it came from the Stipulation Monitoring
16 Program conducted by FMC. A few of the data came from
17 sampling that was done by the DNR.

18 Q And there are some graphs connected to those
19 samples. Can you describe what they are? They're sort
20 of small to read on the screen.

21 A Right. These are -- the vertical scale on the
22 graphs are concentrations of zinc and copper. Copper is
23 represented by a blue line and zinc by a red line.
24 Those concentrations are in micrograms per liter or
25 parts per billion. And then the horizontal axis is

ROBERT NAUTA - DIRECT

1 dates of sample collection.

2 Q If we go to the next appendix in your report, I
3 believe it's Appendix C, you testified yesterday about a
4 site visit that you took when you were out there?

5 A Yes, I did.

6 Q And did you take photos while you were there?

7 A Yes, I did.

8 Q Did you include some of those photos in your
9 report?

10 A Yes.

11 Q Is that what we're looking at on the screen right
12 now?

13 A That's one of the photos; correct.

14 Q What photo is -- what is depicted in photo one?

15 A Photo one is taken from the southwest edge of the
16 biofilter looking north.

17 Q And --

18 A I mean southeast corner. I'm sorry.

19 Q And remind us what time of year you were out there
20 again?

21 A This is February.

22 Q Photo two. What are we looking at there?

23 A This is looking south along the eastern edge of the
24 biofilter, again standing at the southeast corner.

25 Q Photo three has a notation on it. Do you recognize
ROBERT NAUTA - DIRECT

1 that?

2 A Yes.

3 Q When was that notation put on that photo?

4 A I believe during my deposition.

5 Q So what are we looking at in photo three?

6 A The red circle is the arrow or the area where the
7 discharge is from the biofilter at the northeast corner.
8 The lines that I draw on there are going to spots that
9 were rocks that were put along the slope as riprap for
10 erosion control.

11 Q And what are the lines indicating?

12 A It's that there are -- the downward end of those
13 lines end at the points that were rocks that were in the
14 picture, but not very well recognized.

15 Q So what vantage point are you taking that photo
16 from?

17 A I'm standing to the east of the biofilter or to the
18 -- yeah, to the east of the biofilter pointing west.

19 Q What are we looking at in photo four?

20 A In photo four I'm standing at the northwest corner
21 of the biofilter taking a picture toward the northwest
22 to --

23 THE COURT: Away from the biofilter?

24 THE WITNESS: Pardon me?

25 THE COURT: Away from the biofilter?
ROBERT NAUTA - DIRECT

1 THE WITNESS: Yes, Ma'am. That is just looking
2 at the portion of the FMC site that drains into the
3 biofilter.

4 BY MR. CASSIDY:

5 Q And you attached two more photos to your report.
6 What are we looking at in photo five?

7 A This is one of the two culverts under the rail
8 spur. The photo, I'm standing just northeast of the
9 biofilter and I'm taking the photo toward the northeast.
10 This is where Stream C, one of the two culverts for
11 Stream C can cross the rail spur.

12 Q And when you say *cross*, what do you mean by that?

13 A Pass underneath it.

14 Q And you said there were two culverts. How large
15 are these culverts?

16 A They're fairly large. I think they are probably on
17 the order of 36 inches or more.

18 Q Is that diameter?

19 A Yes. Sorry.

20 Q So this is a picture of one of them. Is there
21 another one?

22 A Yes. I think to the left, I think that they were
23 probably sized and spaced for flow conditions and for
24 being structurally supportive of a train passing over.

25 Q And finally we have a picture, photo six. What are
ROBERT NAUTA - DIRECT

1 we looking at there?

2 A This is kind of unfortunate for the -- all the
3 photos I took with the snow cover and the overcast
4 conditions, it's hard to see exactly what's going on
5 here. This is Stream C south of Copper Park Lane where
6 the tributary from the east, the intermittent tributary
7 from the east flows into it. Stream C goes from lower
8 left to upper right and the tributary is right about in
9 the center left and goes off to the upper left.

10 Q And I believe you testified -- well, you had walked
11 down to that point during your visit?

12 A Yes, I did.

13 THE COURT: Was this stream ice or was it
14 moving?

15 THE WITNESS: There was one location in the
16 stream where I could -- where it was open and I could
17 see flowing water.

18 BY MR. CASSIDY:

19 Q Back to Figure 1, did you do anything else to
20 illustrate this data in your report?

21 A I had two other figures where I compared all sample
22 points for copper and zinc respectively.

23 Q Is this one of those figures?

24 A Yes, it is.

25 Q And we're looking at Figure 2; is that correct?

ROBERT NAUTA - DIRECT

1 A Yes.

2 Q And what are you plotting in this figure?

3 A I'm plotting the copper concentrations versus time
4 at seven of the sampling locations.

5 Q And it doesn't show up too well on the screen, but
6 are those plots in color?

7 A Yes.

8 Q And what are the different colors designed to
9 illustrate?

10 A So that you can identify which sample point you're
11 viewing for the individual lines.

12 Q So can you describe to us what the different sample
13 points, how they are plotted on this figure?

14 A What I did was I made it into an Excel spreadsheet
15 and then plotted them on a single graph. I plotted the
16 concentrations on a logarithmic scale because of the
17 wide range of concentrations at different points so that
18 you can identify -- if it would have been an arithmetic
19 scale; for example, the lower concentrations wouldn't
20 have -- they would just have shown up as being on the
21 bottom line.

22 Q Okay. And can you describe the differences between
23 the two sample points on your figure or between the
24 various sample points?

25 A Yeah.

ROBERT NAUTA - DIRECT

1 Q Sorry.

2 A The highest concentrations are attributed to SW-C8,
3 which is adjacent to where a large stockpile had been
4 stored onsite. The next highest is -- well, comparable
5 concentrations at SW-C5 and BFSW-C2. They are slightly
6 lower than at SW-C8.

7 Q And just so we know where those are --

8 A SW-C8 is on the west side of Highway 27. SW-C5 is
9 near the farm culvert downstream from the biofilter, and
10 the BFSW-C2 is the biofilter sample. SW-C3 is a bit
11 elevated as well. It's adjacent to the rail spur, which
12 I think it probably impacted, that location. The SW-1,
13 SW-2 and SW-3 are on the Flambeau River and they're
14 significantly lower than the others ranging from maybe
15 four parts per billion down to nondetect.

16 The most significant thing -- two points from that.
17 One is they are lower. It indicates that the background
18 concentrations are lower than those on Stream C-3.
19 However, SW -- or yeah, SW-3 is where Stream 3 -- Stream
20 C discharges into the Flambeau River. Now we can see
21 that there's not a lot of change in concentration
22 between it and SW-1 and 2. It is consistently higher,
23 there's no point other than where they were nondetected.
24 There's no point on the graph where the other two points
25 are higher than SW-3.

ROBERT NAUTA - DIRECT

1 Q And how did that information inform your opinion
2 regarding the connection between Stream C and the
3 Flambeau River?

4 MR. VAN CAMP: Objection. Foundation.

5 THE COURT: Overruled.

6 THE WITNESS: Well, when analyzing any data,
7 you incorporate what's called the *scientific method*.
8 You observe your data and develop a hypothesis for --
9 that will fit the data set and my hypothesis here is
10 that concentration at SW-3 is higher because of the
11 impact from Stream C.

12 BY MR. CASSIDY:

13 Q And your opinion, which you testified to yesterday,
14 was that due to the direct hydrologic connection, that
15 pollutants were flowing from the biofilter to Stream C
16 to the Flambeau River; is that correct?

17 MR. VAN CAMP: Objection. Leading. And asked
18 and answered.

19 THE COURT: Sustained.

20 BY MR. CASSIDY:

21 Q What was your opinion with relation to the
22 contaminant portion of your report?

23 MR. VAN CAMP: Objection. Asked and answered.

24 THE COURT: Overruled.

25 THE WITNESS: My opinion is that copper and
ROBERT NAUTA - DIRECT

1 zinc are entering Stream C, both near where the
2 stockpile soil had been up near SW-C8 and from the
3 biofilter and that that -- those contaminants enter
4 Stream C and are carried down to the Flambeau River.

5 MR. CASSIDY: Court's indulgence, Your Honor.

6 (Pause) No further questions, Your Honor. (9:34 a.m.)

7 THE COURT: All right. Mr. Van Camp.

8 MR. VAN CAMP: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. VAN CAMP:

11 Q Did I hear you correctly yesterday that the
12 distance from the biofilter to the Flambeau River was a
13 short distance?

14 A No.

15 Q How far is it from the biofilter to the Flambeau
16 River?

17 A Probably several hundred feet.

18 Q How many hundred feet?

19 A I don't know, maybe it's closer to a thousand. I
20 didn't have -- haven't measured it.

21 Q Is it over half a mile?

22 A I don't think so.

23 Q So you have no idea what the distance is between
24 the biofilter and the Flambeau River; true?

25 A I don't have an exact idea, no.

ROBERT NAUTA - CROSS

1 Q You think it's somewhere between 200 and a thousand
2 feet?

3 A I think that's exaggerating my point. I think it's
4 probably closer to a thousand feet.

5 Q In February when you visited the Flambeau Mine
6 site, you walked 200 feet south of Copper Park Lane on
7 Stream C; correct?

8 A Approximately, yes.

9 Q The one thing you added to your supplemental report
10 after you visited the property was -- is on page eight
11 of your report; correct?

12 A Yes.

13 Q In the middle of the page do you see a paragraph
14 that begins with "My interpretation of these plans was
15 confirmed." Do you see that?

16 A Yes.

17 Q That's talking about your visit on February 28th;
18 correct?

19 A Yes, it is.

20 Q The next sentence you say that "the conditions were
21 snow-covered and frozen"?

22 A Yes.

23 Q And then you say that "the channel of Stream C was
24 very evident"?

25 A Yes.

ROBERT NAUTA - CROSS

1 Q Are you speaking of south of Copper Park Lane
2 there?

3 A No, I'm not. North.

4 Q Okay. Let's go to your photographs, beginning on
5 -- this would be 28. First of all, before we blow it up
6 any larger, your description here is a view of the 0.9
7 acre biofilter from the southeast corner; correct?

8 A Yes.

9 Q So you're looking northwest.

10 A Yes, I am.

11 MR. VAN CAMP: Can you blow that up a little
12 more. And move it over to the center so we can see more
13 of the photograph.

14 Q Where in photograph one is this very obvious
15 channel of Stream C?

16 A It's not in this photo.

17 Q Okay. Let's take a look at your second photo.

18 MR. VAN CAMP: Can you move over so we can see
19 his description first. Okay.

20 Q This is your second photograph and the description
21 is a view looking south along the eastern edge of the
22 biofilter.

23 A Yes.

24 Q That was correct; right?

25 A Yes.

ROBERT NAUTA - CROSS

1 Q Okay. Let's look at that photograph. Okay. Now
2 the large white area on the right is a frozen portion,
3 frozen snow-covered portion of the biofilter; correct?

4 A Yes.

5 Q Show me in this photograph where the very obvious
6 Stream C path is.

7 A It's not in this or any of my photos that I
8 included.

9 Q So you were up there looking for a stream path and
10 you didn't put it in any of your photographs?

11 A I took a lot of photos, but because of the snow
12 cover and the lighting conditions, we couldn't always
13 see what I was trying to put in there. So I selected
14 photos that just gave a general understanding of the
15 site.

16 Q Okay. While we're looking at Exhibit 2 or your
17 Photograph No. 2, where is the biofilter outlet?

18 A It's approximately where I'm standing.

19 Q Okay. Then let's look at Photograph 3. Let's look
20 at the description. Photo 3 says it's a picture of the
21 discharge location of the biofilter. Pockets in the
22 topography and between the rocks are filled with ice.
23 Do you see that?

24 A Yes.

25 Q Now we'll look at the photograph. It's fair to say
ROBERT NAUTA - CROSS

1 that the discharge point is choked with grasses and
2 plants; correct?

3 A There was vegetation present, yes.

4 Q And again, there are no clear channels in that
5 photograph coming out of the biofilter; correct?

6 A Correct.

7 Q But that is a photograph looking directly at the
8 discharge point of the biofilter looking from east to
9 west?

10 A Yes, it is.

11 Q So you are actually standing directly in front of
12 the biofilter outlet when you took this photograph
13 looking directly at it; correct?

14 A I believe I was standing in the channel for Stream
15 3 -- Stream C.

16 Q Okay. And if you were standing in that channel,
17 you don't have a photograph of that, do you?

18 A I think I answered that. I don't.

19 Q Okay. And let's look at the fourth photograph.
20 The description for the fourth photograph is "area
21 northwest of the biofilter." Is that north of the
22 railroad spur?

23 A I think that it probably looks over an area where
24 the railroad spur had crossed.

25 Q Okay. And do you see that very obvious channel
ROBERT NAUTA - CROSS

1 anywhere in that photograph?

2 A Northwest of the biofilter, no.

3 Q Okay. Then we'll go to the next photograph. Let's
4 look at the description. The description for Photograph
5 No. 5 is that it's a photograph of the culvert from
6 wetland area northeast of the biofilter.

7 So would you say that you were standing in the
8 wetland, Wetland 7, at the time you took this
9 photograph?

10 A No. And actually in this one you may actually be
11 able to see where Stream C is because I followed the
12 Stream C channel to that culvert and took a picture of
13 it.

14 Q Tell us where you're standing when you took this
15 photograph. Is this standing looking north?

16 A I'm standing looking northeast.

17 Q So you're on the south side of those culverts?

18 A Yes.

19 Q And you're standing in grassland at that point?

20 A I'm standing in the channel for Stream C. It was
21 covered with snow, but I didn't see any grass or
22 vegetation coming out of it.

23 Q Did you take a photograph of it?

24 A I think I said that already. No.

25 Q Okay. Let's look at the next photograph.

ROBERT NAUTA - CROSS

1 Photograph 8, which is the -- I'm sorry, Photo 6, which
2 is the last photograph that you included in your report,
3 is a photograph taken south of Copper Park Lane;
4 correct?

5 A Yes.

6 Q How far south of Copper Park Lane are you when this
7 photograph is taken?

8 A I believe a couple hundred feet.

9 Q And that's as far as you went down; correct?

10 A Yes.

11 Q And you have no idea how far it is from that point
12 to the Flambeau River, do you?

13 A I think it's about the same distance. I think that
14 intermittent stream is about halfway.

15 Q Are you sure this is the intermittent stream that's
16 halfway down?

17 A It was pretty clear to see the channel going
18 straight to the east like the intermittent stream.

19 Q What test did you take on that channel?

20 A None.

21 Q What was the copper concentration in that channel?

22 A I didn't take any tests while I was there. I know
23 the copper concentrations based on what samples had been
24 done by FMC and DNR.

25 Q What was the copper concentration in that tributary
ROBERT NAUTA - CROSS

1 to Stream C?

2 A It's tabulated in the documents I reviewed. I
3 didn't memorize it.

4 Q Is it approximately the same as the biofilter?

5 A I don't remember. I don't think so.

6 Q And that's not influenced at all by Flambeau Mining
7 Company property, is it?

8 A Not that I'm aware of.

9 Q You turned around at that point in the Stream C
10 walk because you concluded to yourself that it was
11 gaining at that point and you didn't need to walk any
12 further; correct?

13 A Well, the conditions were such that it was
14 difficult to walk through there in the winter with all
15 the fallen branches. But yes, it was clear that that
16 stream was growing larger.

17 Q And so you concluded that Stream C below that point
18 was gaining; correct?

19 A I believe it was, yes.

20 THE COURT: By gaining you mean increasing in
21 size?

22 THE WITNESS: Well, typically it's gaining
23 groundwater at this time of the year if it's going to be
24 gaining.

25 BY MR. VAN CAMP:

ROBERT NAUTA - CROSS

1 Q So yesterday when you testified that there was a
2 linear drainage channel north of the stub road culvert
3 and east of the biofilter outlet, you were unable to
4 take a photograph of that linear drainage channel that
5 you described.

6 MR. CASSIDY: Your Honor, form of the question.
7 Asked and answered.

8 MR. VAN CAMP: Well, he --

9 THE COURT: Overruled.

10 THE WITNESS: You know, unfortunately in this
11 business sometimes the conditions aren't such that you
12 can get -- walk away with the information that you had
13 hoped to. No, I didn't get a photo where you could pick
14 out, easily pick out that feature, and so I didn't
15 include any in there.

16 BY MR. VAN CAMP:

17 Q You took no soil samples of anything related to the
18 Flambeau Mine site, did you?

19 A No.

20 Q When you were there, the ground was frozen;
21 correct?

22 A Yes.

23 Q When you were there, you couldn't tell how long a
24 period of time the soil in the area you walked to the
25 east of the biofilter was saturated with water, could

ROBERT NAUTA - CROSS

1 you?

2 A Well, there's plenty of ice visible, so it appears
3 that it's probably saturated fairly regularly.

4 Q Could you tell how long the soil had been
5 saturated?

6 A No.

7 Q You took no water samples at all from anything
8 related to the Flambeau Mine site, did you?

9 A No.

10 Q You took no soil samples related to anything about
11 the Flambeau Mine site, did you?

12 A No.

13 Q You took no tests to determine water flow at the
14 Flambeau Mine site, did you?

15 A Well, I observed it in one location on Stream C
16 south of Copper Park Lane.

17 Q How big an area are you talking about?

18 A It was probably several feet across.

19 Q So the only place that you saw water flowing was
20 not on Flambeau's mine property; correct?

21 A Correct.

22 Q And it was only a couple of feet.

23 A Well, there was an opening in the ice that was a
24 couple feet wide.

25 Q Did you take any tests regarding the direction of
ROBERT NAUTA - CROSS

1 flow coming out of the biofilter?

2 A Well, I could observe the topography. Water flows
3 downhill and it was downhill from the biofilter.

4 Q That wasn't my question.

5 A I didn't take any tests. Well, yeah, I observed.

6 Q Well, are there tests that people like you can
7 perform to determine the direction of water flow?

8 A Sure.

9 Q Did you do any of those?

10 A There was no flowing water to test, so I couldn't.

11 Q Okay. But those tests could have been done; right?

12 A Sure.

13 Q Are you aware of anything you read that
14 demonstrated that anybody did any test to determine the
15 direction of flow outside the biofilter outlet?

16 A Well, it's how you define test. I know that it's
17 common practice to observe the topography and from that
18 you conclude the direction of flow. So yes, we could
19 conclude the direction of flow based on topography.

20 Q Okay. My question was whether or not you did any
21 tests to determine the direction of water flowing east
22 of the biofilter outlet.

23 A I would -- I would define observing the topography
24 as a test, yes.

25 Q All right. Okay. Didn't mean to cut you off.
ROBERT NAUTA - CROSS

1 Sorry. Other than observing, did you take any dye
2 tests?

3 A No.

4 Q Are there other tests than dye tests that can be
5 used to determine the direction of water flow?

6 A I suppose you could put a log in it and watch which
7 way it floats. But my experience with surface water is
8 that they're readily observable and so the dye test or
9 some other test wouldn't be necessary. You take
10 measurements for flow quantities, but you can easily see
11 which way it's flowing.

12 Q Let's start talking about quantities. How much
13 water flowed out of the biofilter?

14 A When?

15 Q Any time.

16 A I don't think anybody measured it.

17 Q Ever. Correct?

18 A Not that I'm aware of.

19 Q So you don't know how much water flowed out of the
20 biofilter; correct?

21 A Well, I'm aware of qualitative citations like heavy
22 flow, moderate flow, low flow.

23 Q Okay. But in terms of how much, you don't know.

24 A No.

25 Q And you don't know how much water flowed out of the
ROBERT NAUTA - CROSS

1 wetland under Copper Park Lane at any time, do you?

2 A No.

3 Q You don't know how frequently water flowed out of
4 the wetland under Copper Park Lane, do you?

5 A No.

6 Q Are you aware of any tests that showed how
7 frequently that occurred?

8 A No. It would probably be easy enough to calculate
9 based on rainfall, along with notations in Ms. Murphy's
10 logbook, you could get an estimate of how often.

11 Q If it was easy enough to do, did you do it?

12 A I didn't have the logbook when I was doing my
13 report. I probably would have if I had it.

14 Q But you didn't do it.

15 A Correct.

16 Q Did you take any elevations?

17 A No.

18 Q Did you take any measurements?

19 A No.

20 Q Did you measure the depth of water at any place?

21 A No.

22 Q Did you measure the width of any channel at any
23 place?

24 A No.

25 Q Did you measure the depth of any channel at any

ROBERT NAUTA - CROSS

1 place?

2 A No.

3 Q You took no measurements at all; correct?

4 A I wasn't there to do that. Correct.

5 Q And you took no chemical tests of anything;
6 correct?

7 A Again, I wasn't there to do that so I didn't.

8 Q You took no pH tests; correct?

9 A Same answer.

10 Q Now you believe that much of the water coming from
11 Stream C and the wetland are to a large extent
12 groundwater discharges; correct?

13 A Correct.

14 Q So what you mean by that is that groundwater is
15 discharging into Wetland 7; correct?

16 A I believe that's why it's a wetland is because of
17 the groundwater component.

18 Q All right. Have you ever heard of a sand point?

19 A Yes, I have.

20 Q What is a sand point?

21 A It's a point that you -- it's an item that you buy
22 off the shelf at Farm & Fleet or Home Depot and you
23 drive it into the ground. It's got a screen at the end
24 and you drive it in and you can -- some people actually
25 use them for water supply purposes.

ROBERT NAUTA - CROSS

1 Q Okay. Are they used to determine the difference
2 between surface water and groundwater levels?

3 A Can be.

4 Q Did you use a sand point in the wetland to the east
5 of the biofilter to determine the groundwater level?

6 A No.

7 Q Did you do anything else to determine the
8 groundwater level in the wetland to the east of the
9 biofilter?

10 A No.

11 Q How much of the water that discharged from the
12 Wetland 7 was groundwater?

13 A I don't know.

14 Q How much of the water that discharged from Wetland
15 7 came from the biofilter?

16 A I don't know.

17 Q How much of the water that discharged from that
18 wetland came from upstream or up elevation, upgrade of
19 the biofilter?

20 A Probably not a lot because you're getting into an
21 area that is probably towards the headwaters of Stream
22 C, but it's going to increase as you go downstream.

23 Q What measurements did you take to determine that it
24 was probably not a lot?

25 A My experience in working with wetlands and streams.
ROBERT NAUTA - CROSS

1 Q Did you ever walk the headwater wetlands?

2 A Not on February 28th.

3 Q Okay. Did you do any studies to determine the
4 amount of runoff from those headwater wetlands?

5 A No.

6 Q Did you do any studies to determine the copper
7 concentrations in those headwater wetlands?

8 A Personally, no.

9 Q So the only tests that you're aware of would be the
10 tests that Flambeau Mining Company did or the DNR did;
11 correct?

12 A Yeah. They were fairly significant.

13 Q Okay. You didn't do any sort of wetland
14 determination in terms of where the wetland was,
15 correct, to the east of the biofilter?

16 A No. One had recently been done because the flags
17 were still evident.

18 Q And you have no reason to disagree with that
19 wetland delineation; correct?

20 A I'm assuming it was done by a professional.

21 Q You don't know?

22 A Well, I think that yesterday the person who did it
23 testified and I believe it sounded like he was
24 qualified.

25 Q Now you would agree that there are tests that could
ROBERT NAUTA - CROSS

1 be performed to determine whether the water coming out
2 of the biofilter entered Stream C; correct?

3 MR. CASSIDY: Your Honor, objection. Asked and
4 answered.

5 THE COURT: Overruled.

6 THE WITNESS: You can make observations. I'm
7 not sure -- I mean testing, it's such a short pathway
8 that, you know, you've got -- it's been tested what was
9 in the biofilter and it's been tested what was in Stream
10 C. I think that is probably a fairly good test right
11 there.

12 BY MR. VAN CAMP:

13 Q Are you aware of any other tests than observation
14 that could be performed to determine that?

15 A Possibly a dye test.

16 Q And you've already testified that you didn't do
17 that.

18 A I did.

19 THE COURT: You did testify that you didn't do
20 that.

21 THE WITNESS: Yes. Sorry.

22 MR. VAN CAMP: Thank you.

23 BY MR. VAN CAMP:

24 Q You would agree that if some water came out of the
25 biofilter, some of it could be taken up by plants?

ROBERT NAUTA - CROSS

1 A Yes.

2 Q You would agree that if some water came out of the
3 biofilter, the soil could absorb some of it?

4 A Yes.

5 Q You would agree that if some water came out of the
6 biofilter, animals could drink it?

7 A Yes.

8 Q You would agree that if some water came out of the
9 biofilter, it could evaporate?

10 A Not the metals in it, but the water, yes.

11 Q Okay. Could we look at Defendant's Exhibit 553.
12 On Defendant's Exhibit 553, do you see the sticker Nauta
13 exhibit or deposition Exhibit 119?

14 A Yes.

15 Q Do you recall looking at this exhibit at your
16 deposition?

17 A Yes, I do.

18 Q Okay. And it's been marked now for trial purposes
19 as Exhibit 553. This is a somewhat difficult photocopy,
20 but this was -- okay. Do you see the faint blue lines
21 -- actually it's a reference point. Why don't we first
22 begin by indicating where the biofilter is. Do you see
23 that?

24 A Yes.

25 Q And that's that square just above the center of the
ROBERT NAUTA - CROSS

1 screen and to -- slightly to the left?

2 A Yes.

3 Q Why don't you go ahead and circle it just so we
4 know that we're talking about the same thing.

5 A (Witness complies)

6 Q Okay. And then just below that, do you see a blue
7 line that goes down toward the Flambeau River?

8 A Yes, I do.

9 Q And do you know what that blue line south of Copper
10 Park Lane depicts?

11 A Stream C.

12 Q Okay. Now can you point out on this exhibit where
13 you walked 200 feet south of Copper Park Lane?

14 A Again, 200 feet was an estimate. I believe it was
15 down in this path here. (Indicating)

16 Q So you're saying that what you just drew, the blue
17 line, is only 200 feet long?

18 A It was a guess.

19 Q Well, do you recall at your deposition you were
20 asked how far you walked down Stream C south of Copper
21 Park Lane?

22 A Yeah. It was a guess then too.

23 Q Okay. But 200 feet though was your guess; correct?

24 A Correct.

25 Q Do you have any idea how long the blue line is that
ROBERT NAUTA - CROSS

1 you drew in this --

2 A It appears a bit longer than that.

3 Q Would you believe 2,500 feet?

4 A No.

5 Q Would you believe 2,000 feet?

6 A That might be stretching it as well.

7 Q Okay. Well, let's talk about things on this
8 exhibit that are marked on the exhibit. Do you see the
9 other blue line coming in from the right that appears to
10 be a tributary to Stream C?

11 A Yes.

12 Q And then do you see the white outline that sort of
13 makes an oval around that blue tributary?

14 A Yes.

15 MR. VAN CAMP: And Susan, can you reduce the
16 size of this for a moment so we can see that entire
17 area?

18 Q Do you see that entire long oval that is outlined
19 with a light line around that tributary?

20 A Yes.

21 Q What is that?

22 A I believe that that's the defined watershed for
23 that tributary.

24 Q What testing did you do in that defined watershed?

25 A None.

ROBERT NAUTA - CROSS

1 Q What results from testing did you review and
2 incorporate in your expert report from that area?

3 A None. I think that was one of the spots where
4 there had been minimal sampling done, so I couldn't
5 compare. So I didn't use it.

6 Q Okay. Let's talk about this minimally sampling
7 thing for a minute. Basically you selected the samples
8 that you wanted to use for your statistical analysis;
9 correct?

10 A Yes.

11 Q And there were a lot of sample points that you
12 didn't include in that; correct?

13 A Yep.

14 Q And many of those sample points had significantly
15 greater copper concentrations than the ones that you
16 used; correct?

17 A Not necessarily, because if you look at the early
18 sampling, the concentrations were pretty much all high,
19 and these are points where there would have been like
20 maybe one or two samples very early on and nothing after
21 that. So I don't necessarily agree with that statement.

22 Q Okay. Well, certainly when you picked your sites,
23 you picked them because of the level of copper
24 concentration; correct?

25 A No.

ROBERT NAUTA - CROSS

1 Q Well, you certainly ignored some that had different
2 levels of copper concentrations; correct?

3 A No, I didn't ignore anything.

4 Q Well, you certainly didn't include them in your
5 calculations; correct?

6 A In my report I did not include them.

7 Q All right. Now let's go back to this drainage
8 area. If you look at the dark box in the middle of that
9 drainage area --

10 MR. VAN CAMP: And Susan, if you'll enlarge it,
11 I think we can read it more easily. Keep going. Okay.

12 Q Can you read now how many acres that drainage area
13 involves?

14 A Looks like 40.2.

15 Q Okay. And then below that oval there is sort of a
16 triangle area that goes down to the Flambeau area -- I'm
17 sorry -- to the Flambeau River. And can you read the
18 number of acres involved in that?

19 A I think it's 18.3.

20 Q In addition to the acres, do you see farms and
21 other buildings in that drainage area?

22 A Well, this is a pretty poor quality. I'll take
23 your word for it that they are farms. I can see there
24 are buildings and other activities, but, you know, if
25 they're farms, they are. Okay.

ROBERT NAUTA - CROSS

1 Q What influence did those two places have on the
2 watershed of Stream C?

3 A What two places?

4 Q The oval-shaped drainage area and the
5 triangular-shaped drainage area.

6 A Well, they would be contributing water to that
7 lower portion of Stream C.

8 Q Okay. And some of the points that you included in
9 your statistical analysis are points on Stream C down by
10 the Flambeau River; correct?

11 A I reviewed some. But again, there were -- those
12 were ones that didn't have enough data to be viable to
13 compare with other points.

14 Q Did you take any tests to determine what the copper
15 concentration going into Stream C was from either that
16 triangular-shaped watershed or that long oval-shaped
17 watershed?

18 A Can I just add I didn't take any tests? That could
19 save us some time.

20 Q Just so we're clear, when you determined to turn
21 around about 200 feet south of Copper Park Lane and you
22 determined that Stream C at that point was gaining, tell
23 us exactly what you mean by *it was gaining*.

24 A It was clearly a larger streambed.

25 Q And are you familiar with the term *gaining* meaning
ROBERT NAUTA - CROSS

1 that it is also receiving groundwater?

2 A Yes, I am.

3 Q Were you concluding that that was the case all the
4 way down to the Flambeau River?

5 A It was certainly the case to the point where I
6 walked. I didn't observe the rest of it, but I'm
7 assuming that because the Flambeau River is such a large
8 and -- such a large recharge feature, it's my experience
9 that the vertical gradients in groundwater are carried
10 through beyond the river itself.

11 Q Okay. Now, in your report you use two sample sites
12 from the Flambeau River for what you call background;
13 correct?

14 A I did.

15 Q How large an area is drained by the Flambeau River?

16 A I think you asked that in my deposition. I don't
17 know how big of an area it is. I think it is fairly
18 narrow extending to the north/northeast, but I don't
19 know how large it is.

20 Q And you did no -- put nothing in your report
21 indicating that there was, in fact, background data
22 involving tests of Stream C prior to mining; correct?

23 A Correct.

24 Q So what you're trying to do is compare the Flambeau
25 River water to Stream C using the Flambeau River water

ROBERT NAUTA - CROSS

1 as background and testing it against Stream C; correct?

2 A Yes.

3 Q Flambeau River is not an intermittent stream, is
4 it?

5 A No, it isn't.

6 Q Do you know how many gallons a second flow down the
7 Flambeau River in the area of the Flambeau Mine site?

8 A No.

9 Q Is it comparable to Stream C?

10 A I don't think so.

11 MR. VAN CAMP: Just one moment, Your Honor.

12 (Pause) No further questions. Thank you. (10:10 a.m.)

13 MR. CASSIDY: Thank you, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. CASSIDY:

16 Q Mr. Nauta, Mr. Van Camp just asked you a couple
17 questions about the Flambeau River and why you chose
18 certain points in the Flambeau River.

19 A Yes.

20 Q And again, you didn't choose those points, did you,
21 in terms of where the samples were taken?

22 A No, I didn't.

23 Q Where did that data come from?

24 A That was from the -- that was from -- I think the
25 DNR collected those data.

ROBERT NAUTA - REDIRECT

1 Q And Mr. Van Camp asked you about the number of
2 gallons of water that come down the Flambeau River. Do
3 you remember that question?

4 A Yes.

5 Q And then he asked you do you think it's comparable
6 to Stream C and you said I don't think so. Do you
7 remember that?

8 A Yes.

9 Q Were you suggesting in your report that the volume
10 of water in the Flambeau River was comparable to the
11 volume of water in Stream C?

12 A No, I wasn't.

13 Q Is that why you answered that question that way?

14 A Yes.

15 Q So how are they comparable? Why did you choose
16 those facts?

17 A Well, in reviewing documents from my report, one of
18 the documents that I reviewed was -- excuse me, if I can
19 turn the page here. It was Surface Water Quality
20 Assessment of the Flambeau Mine site prepared by Craig
21 Roesler of the DNR, and in that document he looked at
22 water quality from the Flambeau River, Stream A and
23 Stream B, which are both on the Flambeau property to the
24 north, and from a reference stream, which I think was
25 about two-and-a-half miles away. And they all had

ROBERT NAUTA - REDIRECT

1 comparable water quality, so he concluded that the water
2 quality in those streams were representative of
3 background quality. And so because we had data over
4 time from the Flambeau River, I chose that.

5 Q You were asked a lot about tests and I think you
6 said you didn't take any tests.

7 A Correct.

8 Q And why didn't you take any tests yourself?

9 A Well, I've done many projects where I haven't taken
10 any tests myself where I've relied on other people to do
11 the work, whether they're people working for me or like
12 in this case where sampling had already been done in a
13 professional manner that were sufficient for me to reach
14 my conclusions.

15 Q And again, you mentioned samples you relied on from
16 the DNR. But were most of the samples you relied on
17 from Flambeau?

18 A Yes.

19 Q How does this database compare to some of the other
20 projects you work on in terms of its scope and
21 completeness?

22 MR. VAN CAMP: Objection. Improper cross.

23 THE COURT: I'm sorry, I couldn't hear you.

24 MR. VAN CAMP: Improper cross. I didn't ask
25 about other projects he worked on.

ROBERT NAUTA - REDIRECT

1 MR. CASSIDY: He asked --

2 THE COURT: Sustained.

3 BY MR. CASSIDY:

4 Q In your opinion, was this data set sufficient for
5 coming to the conclusions you came to?

6 A Yes.

7 Q And why is that?

8 A You've -- basically you have to work with what you
9 have, and in this case, there was a long history of
10 sample collection. And at the points that I utilized,
11 it was actually -- it was also fairly frequent sample
12 collection and so it seemed suitable.

13 Q And that was -- we're talking about concentrations
14 right now. And Mr. Van Camp also asked you about flow.
15 Did you feel it was necessary to take a test to
16 determine which way the water was flowing?

17 A No.

18 Q Why not?

19 A Because it was pretty clear just based on the
20 observable topography.

21 Q Have you ever heard anyone dispute when you're
22 talking to -- have you ever -- in the course of your
23 investigation, have you seen any dispute in any document
24 that you reviewed about which direction Stream C flows?

25 MR. VAN CAMP: Objection. Relevance.
ROBERT NAUTA - REDIRECT

1 THE COURT: Overruled.

2 THE WITNESS: No, I haven't.

3 BY MR. CASSIDY:

4 Q Yesterday Mr. Van Camp asked you also about dye
5 tests. Do you remember that?

6 A Yes.

7 Q I believe yesterday you testified that -- when he
8 asked you about a dye test from the biofilter?

9 A Yes.

10 Q And you didn't perform a dye test from the
11 biofilter?

12 A Correct.

13 Q Yesterday you testified that the distance from the
14 toe or the bottom of the biofilter outlet to Stream C
15 was about from you to me?

16 A Yes.

17 MR. VAN CAMP: Objection. Leading.

18 THE COURT: Sustained.

19 BY MR. CASSIDY:

20 Q What did you testify the distance was between the
21 biofilter outlet and Stream C?

22 MR. VAN CAMP: Objection. Improper cross.

23 THE COURT: Overruled.

24 THE WITNESS: You were standing at the podium
25 and I said it was from me to you.

ROBERT NAUTA - REDIRECT

1 BY MR. CASSIDY:

2 Q Did you need to do a dye test to determine the
3 water flow that amount of distance?

4 A No.

5 Q Mr. Van Camp asked you about information or samples
6 that you didn't include in your figures. Do you
7 remember that?

8 A Yes.

9 Q And you answered -- he asked you -- he suggested
10 that you ignore them and you said you didn't ignore
11 them. What did you mean by that?

12 A Well, I reviewed and considered all of the data
13 that was available to me, but I selected locations where
14 I was looking for two things: One is to try to get
15 representative locations from the headwaters of Stream C
16 to the Flambeau River, but I was also looking for sample
17 points where there had been a long and frequent history
18 of sampling and that's why those sites were chosen.

19 Q And then again, you were asked questions about the
20 dye tests. Have you -- when do you normally perform dye
21 tests during the course of your work?

22 A Well, I've never done it for surface water because
23 I've never seen it as necessary because you can observe
24 surface water. I've done it for groundwater where you
25 can't observe it like that, where you've only got

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1 discrete points, and so there I've done dye tests.

2 Q Mr. Van Camp also asked you some questions about
3 Wetland 7 and the headwaters. Do you have an opinion
4 about where the headwaters to Wetland 7 are?

5 A Yeah. I believe that they're in the area of -- I
6 concur with Craig Roesler that it's in the area of
7 Highway 27.

8 Q And speaking of Mr. Roesler, Mr. Van Camp asked you
9 a lot of questions about the flow and Stream C's flow to
10 the Flambeau River. Do you remember those questions?

11 A Yes.

12 Q And I'm going to put on the screen your report
13 again. This is page eight. And if you look here --
14 sorry.

15 A I can see it.

16 Q You talk about flow from Stream C from Highway 27
17 to the Flambeau River and you indicate that this was
18 substantiated by Craig Roesler in a deposition. You
19 gave a footnote there; right?

20 A Yes.

21 Q Is that one -- some of the information you relied
22 on to reach your conclusion?

23 A Yeah, it was -- it's one of the things I relied on.
24 It also refers to a report by Roger Jasinski, I think he
25 was with the DNR, that confirmed it. And I also looked

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1 at the -- I think it's called the *Surface Water Data*
2 *Viewer* on the DNR website where they've mapped wetlands
3 and other surface waters and it shows a line going all
4 the way to the Flambeau River.

5 Q I'm going to show you -- we talked a lot about or
6 Mr. Van Camp asked you a lot of questions about channels
7 and whether or not you took a photograph of them or not.

8 A Yeah.

9 Q Do you remember those? I'm going to show you a
10 photograph that's marked Exhibit 12. It's already in
11 evidence. Do you recognize the view in that photograph?

12 A Yeah. It looks like somebody was standing probably
13 on Copper Park Lane looking to the north. I recognize
14 the farm culvert and the stand of evergreens just beyond
15 that.

16 Q Okay. And you were out there during the
17 wintertime --

18 A Yes.

19 Q -- when you visited when there was snow on the
20 ground?

21 A Yes.

22 Q I'm going to show you another photo. It's marked
23 Exhibit 86. Do you recognize the view in that photo?

24 A Yeah, it's the same as the previous one.

25 Q Do you see a channel there?

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1 A Yes, I do.

2 MR. CASSIDY: Your Honor, we move Exhibit 86.

3 I believe the defendants have already stipulated to its
4 admission.

5 MR. VAN CAMP: No objection.

6 THE COURT: Received.

7 MR. CASSIDY: No further questions, Your Honor.

8 THE COURT: Mr. Van Camp. (10:23 a.m.)

9 MR. VAN CAMP: Before I forget, move to admit
10 Exhibit 553.

11 THE COURT: Any objection?

12 MR. CASSIDY: No objection, Your Honor.

13 THE COURT: It's received.

14 RE CROSS-EXAMINATION

15 BY MR. VAN CAMP:

16 Q Now you indicated -- we've been talking about trial
17 Exhibit 18 as your supplemental report. The initial
18 report that you did that had the same opinions in it was
19 done on October 10th; correct?

20 A Correct.

21 Q In your redirect, you testified that one of the
22 things you relied on was a water assessment done by
23 Mr. Roesler; correct?

24 A Yes.

25 Q That report was done after you wrote your report,
ROBERT NAUTA - RE CROSS

1 wasn't it?

2 A Yes, it was.

3 MR. CASSIDY: Objection. Which report?

4 BY MR. VAN CAMP:

5 Q The October 10th, 2011, report that had the same
6 opinions as the supplemental report; correct?

7 A Correct.

8 Q Now you were asked some questions about dye tests.
9 If Stream C south of Copper Park Lane is a losing stream
10 and you wanted to know where the water went after it
11 went down into the ground, wouldn't a dye test be an
12 appropriate test to determine where it went?

13 MR. CASSIDY: Your Honor, I'm going to object.
14 Facts not in evidence. And I didn't ask him --

15 THE COURT: Overruled.

16 MR. CASSIDY: -- about gaining or losing.

17 THE COURT: Overruled.

18 THE WITNESS: If, in fact, you had a dry
19 stretch of the stream, it would be a feasible use of it
20 there.

21 MR. VAN CAMP: Nothing further. Thank you.

22 THE COURT: You may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Is Mr. Nauta free to leave?

25 MR. VAN CAMP: Yes.

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1 MR. CASSIDY: Yes, Your Honor.

2 (Witness excused at 10:24 a.m.)

3 MS. MCGILLIVAY: Your Honor, plaintiffs will
4 now by designation introduce testimony of Elizabeth Day.

5 THE COURT: That's fine.

6 MS. MCGILLIVAY: And to facilitate this,
7 Attorney Christa Westerberg will take the stand.

8 THE COURT: All right.

9 MS. MCGILLIVAY: I have prepared and marked, if
10 I may approach, a revised list of the designations that
11 we've altered a bit since we --

12 THE COURT: Okay.

13 MS. MCGILLIVAY: -- filed it on ECF. I marked
14 it for convenience as Exhibit 9B.

15 THE COURT: Thank you.

16 MS. MCGILLIVAY: I also have -- the Day
17 transcript is already marked as Exhibit 70 from April
18 13th. The April 18th deposition transcript has not yet
19 been marked, so I marked that as Exhibit 91.

20 We're going to begin on Exhibit 70, which is the
21 April 13th, 2012, deposition. Are you there,
22 Ms. Westerberg? Starting at page four, line 4 to 9.

23 **ELIZABETH DAY, DEPOSITION EXCERPTS READ,**

24 Q " Good morning, Ms. Day. My name, as we stated off
25 the record, is Pam McGillivay and I'm one of the

1 attorneys for the plaintiffs" --

2 THE COURT: Could you get a microphone near
3 you? That's a good idea.

4 MS. MCGILLIVAY: At page four, line 4 to 9.

5 BY MS. MCGILLIVAY:

6 Q "Good morning, Ms. Day. My name, as we stated off
7 the record, is Pam McGillivray and I'm one the attorneys
8 for the plaintiffs, and I understand that we've done
9 introductions off the record, but could you please state
10 your name again.

11 A My name is Elizabeth A. Day."

12 MS. MCGILLIVAY: Page six, line 8 to page 8,
13 line 12.

14 Q "Okay. All right. So now -- so you now work for
15 Stantec. Stantec, Incorporated?

16 A Stantec Consulting Services, Inc.

17 Q Consulting Services, Inc. And since when have you
18 worked for Stantec?

19 A Since 2001.

20 Q And if I use the abbreviated form Stantec, will you
21 know what I'm referring to?

22 A Yes.

23 Q Since 2001. Prior to 2010 was Stantec known as
24 NRC?

25 A That's correct.

1 Q Okay. So between 2001 and 2010 you worked for NRC,
2 is that --

3 A That's correct.

4 Q And what does NRC stand for?

5 A Natural Resources Consulting.

6 Q In 2010 NRC became Stantec, a part of Stantec; is
7 that right?

8 A That's correct. We were acquired.

9 Q Did your job description change at all in 2010 with
10 the change of ownership?

11 A No.

12 Q And what is your current job or what is your
13 position?

14 A I'm a Senior Environmental Scientist.

15 Q Located where?

16 A In Cottage Grove, Wisconsin.

17 Q And have you been in Cottage Grove since 2001?

18 A Yes. That's been my home office.

19 Q Okay. How long have you held the title of Senior
20 Environmental Scientist?

21 A Probably since I started there.

22 Q Have your job duties been roughly the same since
23 2001?

24 A They have evolved over time, but generally, yes.

25 Q Okay. So can you describe for me what a Senior

1 Environmental Scientist does at Stantec?

2 A I put proposals together for projects that come in
3 and I manage the work teams. I meet with agencies and I
4 meet with clients and I do some field work; much less
5 now than when I started. I write reports and I write
6 permit applications.

7 Q And what type of projects do you put proposals
8 together for?

9 A It's run the gamut. At this point, we're doing a
10 lot of utility work and that's primarily what I'm
11 involved in, but also transportation work.

12 Q Would those be wetland delineations for utilities?

13 A That's correct.

14 Q Okay. When you refer to projects, are you
15 referring to wetland delineations?

16 A Well, like I said, I do very little field work now.
17 I'm old, you know. I let the other people do it. So
18 mostly at this point I'm managing the field efforts,
19 organizing them, letting people know what they need to
20 look for in the field, and putting together the permit
21 applications and doing meetings."

22 MS. MCGILLIVAY: Page 19, line 4.

23 Q "When you were -- when you were at the Flambeau
24 Mine site on October 18, 2011, can you describe what you
25 did while you were there?

1 A While I was there, I walked the drainageway known
2 as Stream C from Highway 27, just above Highway 27 down
3 to the Flambeau River.

4 Q What do you mean by drainageway? Can you define
5 that term for me?

6 A Define drainageway?

7 Q Yes.

8 A It's an area through which water collecting from a
9 watershed drains.

10 Q And you identified a drainageway that had been
11 called Stream C; is that correct?

12 A I didn't identify it, no.

13 Q Okay. How did you choose your course of inspection
14 on October 18th, 2011?

15 A I chose it based on essentially the lowest point
16 through there and we were looking for any evidence of a
17 waterway.

18 Q So you began upgradient of a drainageway and walked
19 the area in the lowest point of that drainageway to the
20 Flambeau River; is that --

21 A We began upgradient of Highway 27.

22 Q So you didn't inspect the entire drainageway, is
23 that a correct understanding?

24 A No.

25 Q Okay.

1 A Well, we didn't go upgradient more than 10 or 20
2 feet of Highway 27.

3 Q So beginning just -- so beginning around just
4 somewhere east of Highway 27, you inspected the
5 drainageway through to the Flambeau River?

6 A That's correct."

7 MS. MCGILLIVAY: Page 84. Line 11. We're on
8 8. Thank you.

9 Q "Actually before we leave that, that sentence, just
10 to finish up the adjacent wetlands discussion, can you
11 refer to Exhibit 165, which is the 2008 guidance.

12 A Okay.

13 Q And then if you turn to page five of that document,
14 the second full paragraph that begins, 'The regulations
15 define adjacent as follows: The term *adjacent* means
16 bordering, contiguous or neighboring wetlands separated
17 from our waters of the United States by manmade dikes or
18 barriers, natural river berms, beach dunes and the like
19 are adjacent wetlands.'

20 Is that your understanding of adjacent wetlands
21 that you were just describing as far as whether or not a
22 wetland that is downgradient from a stream can be
23 adjacent to it?

24 A Well, the one I have to clarify here is that we
25 haven't determined if this waterway right here is a

1 water of the U.S. and that's what the adjacency
2 determination is. I would say that if this is
3 determined, if Stream C south of Copper Park Lane were
4 determined to be a water of the U.S., which has to be
5 done by doing a significant nexus test, then based on
6 this statement in here which you found for me, which I
7 should have known, then yes, Wetland 7 would be
8 adjacent. But first you have to figure out if the
9 stream south of Copper Park Lane is a water of the U.S.

10 Q Okay. So if there has been a determination that
11 Stream C south of Copper Park Lane is a water of the
12 U.S --

13 A Yes.

14 Q -- then the wetland that is delineated on Exhibit
15 169 would be an adjacent wetland.

16 A Yes. But that hasn't been done."

17 MS. MCGILLIVAY: Page 88, line 5 to page 90,
18 line 10.

19 Q "Okay. Back to 'Stream C.' I think we already
20 talked about this, but I just want to make sure I
21 understand your use of the term *Stream C*. Do you agree
22 that there's a stream south of Copper Park Lane that is
23 called Stream C?

24 A There is a drainageway south of there that flows
25 from the area that all the FMC materials have referred

1 to as Stream C. Stream C is usually a name that is
2 provided in an area north of Copper Park Lane, but I
3 understand that it's the same drainageway.

4 Q Okay. So the same drainageway exists -- strike
5 that. The drainageway that you have recognized as
6 having channelization south of Copper Park Lane exists
7 north of Copper Park Lane in the area that has been
8 known as Stream C. Is that a correct statement of what
9 you just said?

10 A I'm not sure really. Why don't you try restating
11 it.

12 Q I'm still trying to, I think, parse out what you
13 were meaning by terms. So when you use 'Stream C' are
14 you referring to the drainageway north of Copper Park
15 Lane that goes through the wetland and to the northeast
16 upgradient to the northeast under Highway 27?

17 A Now wait. Now you're going on the other side of
18 Highway 27?

19 Q Well, okay. When you did your inspection, you
20 inspected four culverts; correct?

21 A One, two, three, four, yes.

22 Q And I can point to your report where you discuss
23 the culvert if that --

24 A Yes. I looked at four culverts.

25 Q Okay. And the first culvert is the one that

1 crosses --

2 A 27.

3 Q Right.

4 A Um-hmm.

5 Q The Stream C drainageway exists on the other side
6 of that culvert; do you agree?

7 A It's all the same drainageway. A drainageway is a
8 conveyance of -- a general location of a conveyance of
9 water within a watershed. You know, they have chosen to
10 call it Stream C. It's the same. It's the same pathway
11 of drainage on, yes, on east of 27, west of 27, in the
12 area north of Copper Park Lane, and south of Copper Park
13 Lane.

14 Q Okay. By drainageway -- well, strike that. The
15 drainageway that you have identified as Stream C north
16 of Copper Park Lane to the other side of Highway 27 to
17 the east of Highway 27, if I heard your testimony
18 correctly, if sufficient water is present in the
19 drainageway to flow, it will flow downgradient within
20 that drainageway towards Copper Park Lane through the
21 culvert to the other side of Copper Park Lane; true?

22 A That's a true statement.

23 Q In your report you use the term *headwater wetlands*.

24 A Yes."

25 MS. MCGILLIVAY: Okay. And then the exhibit --

1 the designation in Exhibit 91 is the April 18th, 2012,
2 deposition of Elizabeth Day. Starting at page 109, line
3 10 to 111, line 9.

4 Q "Looking at Exhibit 169, it contains -- it depicts
5 an intermittent stream as a dotted blue -- as a blue
6 line along -- through the wetland; correct?

7 A It does, yes.

8 Q Okay. And if I understood your testimony
9 correctly, you agree with the general path, the general
10 flow path of the drainageway as depicted on 169, but not
11 the designation of that flow path as an intermittent
12 stream north of Copper Park Lane; is that correct?

13 A I agree with there being a conveyance of water from
14 east of Highway 27 through the outlet -- outlot and down
15 south of Copper Park Lane, yes. But I don't agree that
16 it's an intermittent stream per se.

17 Q An intermittent stream north of Copper Park Lane or
18 an intermittent stream at all?

19 A North of Copper Park Lane.

20 Q Okay. I just wanted to make sure that -- the term
21 Stream C has been used so much, I wanted to be sure we
22 were talking about the same thing.

23 A I know.

24 Q We also talked about this at your deposition, but
25 there is also a directional line moving from the 0.9

1 acre biofilter basin toward the wetland. Do you see
2 that line?

3 A Yes.

4 Q And you agree with the directional flow as depicted
5 by the arrow; correct?

6 A That would be the direction of flow, yes.

7 Q Okay. And would you agree that the wetland drains
8 towards its lowest point in the wetland?

9 A I'm not sure what you're asking.

10 Q Okay. I'll just ask you it this way: Would
11 flow -- if there was sufficient flow from the biofilter
12 in the wetland, would it follow the path of the
13 drainageway?

14 Mr. Van Camp: I'm going to object to the form of
15 the question. If you understand, you can answer.

16 A I don't. Could you restate it?

17 Q Sure, sure. If there -- if there -- if there was
18 flow from the biofilter to the wetland, would that flow
19 go in the direction toward the drainageway?

20 A It would go to the lowest -- I mean it would go
21 from the highest to the lowest point if there were
22 surface water flow.

23 Q And the lowest point is -- in that wetland is what
24 you're referring to as the drainageway known as Stream
25 C; correct?

1 A Generally, yes."

2 MS. MCGILLIVAY: Thank you. Your Honor, if the
3 witness had been here live, I would have identified Day
4 deposition Exhibit 169 that was referenced in this
5 exchange as Trial Exhibit 1024, which has been admitted.

6 THE COURT: So are you moving it in at this
7 time?

8 MS. MCGILLIVAY: 1024 has already been
9 admitted, but she refers to it as Deposition Exhibit
10 169. It's the same document.

11 THE COURT: I get it. Okay. That's it with
12 Ms. Day?

13 MS. MCGILLIVAY: That's it. We will have
14 counter designations after Mr. Van Camp's case, and if
15 you would give me one moment to confer with counsel to
16 see -- I think we're about to rest, but I have to make
17 sure.

18 THE COURT: All right.

19 (Pause)

20 MS. MCGILLIVAY: Looks like they agree.
21 Plaintiffs rest, Your Honor.

22 THE COURT: All right. We'll take 15 minutes
23 and resume with the defendant's case.

24 MR. VAN CAMP: Your Honor, we will be filing a
25 motion at this point.

1 THE COURT: All right. We'll take that up as
2 soon as we get back from the break.

3 MR. VAN CAMP: Okay. Thank you.

4 THE COURT: Court is in recess.

5 (Recess 10:40-10:55 a.m.)

6 THE COURT: Mr. Van Camp.

7 MR. VAN CAMP: Yes. Thank you, Your Honor. At
8 this time the defendant, Flambeau Mining Company, moves
9 to dismiss all of the causes of action in this case
10 brought against it by the plaintiffs in this case. I
11 would like to file a written motion for judgment.

12 THE COURT: All right. Want to just leave it
13 at that?

14 MR. VAN CAMP: I'm sorry?

15 THE COURT: You want to leave it at that or --

16 MR. VAN CAMP: I have a few more things to say.

17 THE COURT: Oh, okay.

18 MR. VAN CAMP: While we have presented 32 pages
19 of arguments as to reasons that the case should be
20 dismissed at this point, I have provided just now copies
21 to the defendants of the motion. But I would ask the
22 Court to additionally entertain an oral motion to
23 dismiss based on the paucity of the evidence that has
24 been provided in this case in support of significant
25 nexus between anything that occurred involving

1 discharges from the biofilter. There is no evidence
2 whatsoever of any biological nexus. There's no evidence
3 at all of a chemical nexus. The evidence about
4 chemistry simply seems or simply identifies points where
5 various measurements were taken, but it does not
6 indicate any movement of those chemicals within that
7 system.

8 As far as the physical nexus, the only evidence in
9 the record is that on very, very few, perhaps seven
10 occasions, many of which are before 2004, there were
11 witnesses who claim that they viewed discharges from the
12 biofilter and that they witnessed those discharges going
13 in the direction of Stream C. These witnesses are not
14 credible. Their testimony was inconclusive. And I
15 think given the absolute evidence of any experts who
16 could testify about the movement of anything occurring
17 in this system, about anything biological going on in
18 the system, no discussion about what is happening with
19 other contributors to the system or how that affects any
20 of the discharges from that system into the wetland, I
21 think it is appropriate at this time to dismiss. Thank
22 you.

23 THE COURT: Thank you.

24 MR. BENDER: If I may address the Court, Your
25 Honor.

1 THE COURT: You may.

2 MR. BENDER: Your Honor, obviously plaintiffs
3 would like a chance to review and then respond to the
4 written motion.

5 THE COURT: You will have a chance to do so.

6 MR. BENDER: Just briefly in response to the, I
7 guess, supplemental oral motion here, just to review,
8 plaintiffs believe that the evidence shows three
9 different things:

10 First, it shows that Stream C exists north of
11 Copper Park Lane. It's a continual or continuous water
12 feature from the Flambeau River north all the way to --
13 at least to Highway 27, which is northeast of the
14 biofilter outfall. The eyewitness accounts correspond
15 to Flambeau Mining Company's own sampling programs which
16 sample locations along what they described at the time
17 as Stream C, which line up with their own documents
18 identifying the water feature. Certainly there's
19 culverts that deliver water between pieces of what's now
20 been manipulated by Flambeau Mining Company, which is
21 that water body of Stream C, including north of Copper
22 Park Lane.

23 We heard eyewitness testimony about flow in that
24 direction. We have photographs in the record showing
25 that body of water easily discernible in the photos.

1 While defendants predictably I guess in this case
2 take -- now take the position that there is no water
3 body there or if there is it's only a wetland, I think
4 the testimony and the photographic evidence, as well as
5 Mr. Nauta's testimony, identifies a continuous water
6 feature there that's delivering water, and with it,
7 certainly all soluble and probably many of the
8 particulate contaminates with it.

9 The other thing that the evidence shows is that
10 even if that water feature were not there and part of
11 Stream C, the gradient in the area, the slope of the
12 land delivers water, and with it, pollutants south; the
13 distance from the biofilter outfall to certainly the
14 farm road culvert, which is where channelization begins,
15 and also from there within that channelization south of
16 Copper Park Lane. In fact, the testimony or actually
17 the stipulated facts on discharge dates from the
18 biofilter correspond to dates in Jana Murphy's own
19 logbooks recording downstream from the biofilter flows
20 in her qualitative terms and which corroborates that the
21 flow is in that direction and on the days at issue.

22 Lastly, the wetland, Wetland 7 we've been
23 discussing, is physically connected to Stream C south of
24 Copper Park Lane and therefore to the Flambeau River.
25 As we've heard testimony, there's an inlet to the north,

1 two railroad spur culverts that deliver water into that
2 area. To the south there is that farm road culvert
3 which funnels the area into the channelization between
4 the farm road, Copper Park Lane, and from there under
5 Copper Park Lane, and as Mr. Nauta testified, delivers
6 its pollutants, especially the soluble versions of
7 metals that are dissolved in water and flow with it.

8 Mr. Nauta's testimony included his correlations of
9 biofilter outfall, including concentrations, and then
10 sample points south of there as that -- as those
11 pollutants travel south, establishing a chemical
12 connection between that area east of the biofilter and
13 south of Copper Park Lane.

14 For any one of those three reasons, we believe that
15 jurisdictional water is shown in that area into which
16 the biofilter flows and especially here where we believe
17 the evidence has shown that all three of those things
18 are true. Thank you.

19 THE COURT: Thank you. I'll take the motion
20 under advisement. Mr. Van Camp, you may proceed with
21 your case.

22 MR. VAN CAMP: Thank you. At this time we
23 would like to present the evidentiary deposition of
24 Elizabeth Day, beginning with page one through the end
25 of that direct examination which ends on page 86.

1 MS. MCGILLIVAY: Your Honor, before we begin
2 the videotape, could I just have a point of
3 clarification which is I'm not quite certain how to
4 interpose objections to the taped video. There are form
5 objections on the transcript, but we have stated other
6 objections, and they're listed on Exhibit 90 that I
7 provided this morning, including objections --

8 THE COURT: Well, let's take them up now. I'll
9 just get that exhibit in front of me. Did you actually
10 give me the physical copy of the exhibit?

11 MS. MCGILLIVAY: The exhibit for the April 18,
12 2012 deposition transcript is Exhibit 91 and I just
13 handed it to you this morning, I believe, Your Honor.

14 THE COURT: All right.

15 MS. MCGILLIVAY: And the objections are listed
16 on Exhibit 90. Your Honor, I have --

17 THE COURT: I found it. I have 91.

18 MS. MCGILLIVAY: 91 would be the deposition
19 transcript and Exhibit 90 had our designations on it. I
20 have another copy here.

21 THE COURT: Good. Thank you.

22 MS. MCGILLIVAY: Our objections begin on page
23 three.

24 THE COURT: Of the deposition.

25 MS. MCGILLIVAY: Well, would you like me to go

1 through and -- okay. They begin -- the list begins on
2 page three of Exhibit 90 and the first objection appears
3 on page eight, line 11.

4 THE COURT: Okay. Lines 11-19.

5 MS. MCGILLIVAY: On the basis of hearsay that
6 deposition Exhibit 164, which is her expert report, has
7 been read into the record.

8 THE COURT: Am I looking at the right thing?
9 This is line 11, "I'm marking your resume separately"?

10 MS. MCGILLIVAY: The line -- Your Honor, the
11 witness at that point was reading from her expert report
12 rather than giving her testimony, so the objection was
13 based on hearsay. Okay.

14 THE COURT: Let's skip that one.

15 MS. MCGILLIVAY: The next one was the subject
16 of a motion in limine that was denied which was we had
17 stipulated to her qualifications as a witness and
18 objected to their proposed facts as having the
19 qualifications listed. That motion in limine was
20 denied. But deposition page -- deposition at page 8 to
21 28 restate her qualifications. Our objection is
22 relevance because it's been stipulated to by the
23 plaintiffs and cumulative.

24 MR. VAN CAMP: I thought that had been denied.

25 THE COURT: It had been. It will stay in,

1 although it seems like a long time to spend on your
2 scientific knowledge. All right. 29.

3 MS. MCGILLIVAY: 29. 29, 10 to page 30, 14, on
4 the basis of legal conclusion, and also on the basis of
5 the motion in limine, which is Docket No. 234, excluding
6 legal conclusion from Ms. Day.

7 THE COURT: So you're saying 29, 10 through 30,
8 14 and that will not -- I will not consider that.

9 MR. VAN CAMP: May I ask for clarification
10 about that?

11 THE COURT: Yes.

12 MR. VAN CAMP: We'll be playing a video.

13 THE COURT: Don't bother --

14 MR. VAN CAMP: Do you want me to stop it and
15 restart --

16 THE COURT: Since there's no jury here, I'll
17 just ignore it. And then 31, 8.

18 MS. MCGILLIVAY: 31, 8. Form of objection
19 during the deposition as vagueness.

20 THE COURT: Overruled.

21 MS. MCGILLIVAY: 32, 16 to 34, 4. It was on
22 relevance given the summary judgment decision, finding
23 that the Flambeau and --

24 THE COURT: I agree. I don't think there's
25 anything relevant about that. Again, I'll just ignore

1 it.

2 MS. MCGILLIVAY: Okay. 33, 14 to 15.

3 Objection is leading.

4 THE COURT: Wait just a minute. 33 -- well,
5 that's going out anyway.

6 MS. MCGILLIVAY: Okay. 39, 18 through 40, 11,
7 which was a similar objection to the one before in which
8 the report was read into the record.

9 THE COURT: I'm sorry, I'm not following this
10 objection.

11 MS. MCGILLIVAY: Rather than testifying, she's
12 reading her out-of-court statement into the record.

13 THE COURT: But it's her own statement. I'll
14 overrule that.

15 MS. MCGILLIVAY: 42, 15 was again based on the
16 summary judgment decision that came out after -- strike
17 that. It actually came out before this deposition.
18 Based on relevance as south of Stream C had been found
19 to be a water of the United States.

20 THE COURT: I'll overrule that objection. Then
21 47, 13.

22 MS. MCGILLIVAY: The basis of that objection
23 was a lack of foundation and lacks probative value and
24 reliability as the witness is opining what other
25 professionals meant by using a term, the term Stream C

1 on designated documents.

2 THE COURT: I'll sustain that objection.

3 MR. VAN CAMP: I'm sorry, what was the basis of
4 the objection?

5 THE COURT: That she simply is referring to
6 observations made by others about where and what Stream
7 C is.

8 MS. MCGILLIVAY: 53. Page 53, line 18 through
9 54, 2. Speaks to flow south of Copper Park Lane, and so
10 the objection was relevance.

11 THE COURT: Overruled.

12 MS. MCGILLIVAY: 55, 15 to 58, 10. Legal
13 conclusion.

14 THE COURT: Yes, I'll take that out.

15 MS. MCGILLIVAY: Page 60, line 14. I'll
16 withdraw the objection based on hearsay and restate the
17 objection for relevance and legal conclusion from page
18 60, line 14.

19 THE COURT: All right. 60, 14. I don't think
20 that's necessary.

21 MS. MCGILLIVAY: Through page 61, 12.

22 THE COURT: Right. And then 61, 13.

23 MS. MCGILLIVAY: To 71, 2 is a continued -- for
24 the objection -- same objection. Legal conclusion.

25 THE COURT: Well, I'm going to leave it in. I

1 can ignore her legal conclusions, but I think it's hard
2 to separate some of her observations from her legal
3 conclusions. All right. And 63, 25.

4 MS. MCGILLIVAY: Yes, Your Honor. I should
5 have added also the basis of the motion in limine where
6 she's opining on the sufficiency of the evidence
7 presented by plaintiffs.

8 THE COURT: Well, I'll just ignore that. Then
9 75, 3.

10 MS. MCGILLIVAY: 75, line 3 to 76, 14 on the
11 basis of legal conclusion.

12 THE COURT: I think I'll just stick with the
13 same resolution. I'll listen to what she says and
14 ignore any legal conclusions that she makes. And the
15 same would be true for 75, 18 and 79, 20. Then 80, 14.
16 And your objection is relevance?

17 MS. MCGILLIVAY: The remaining portion speaks
18 to the area that had been designated as a water of the
19 United States and the objection was relevance.

20 THE COURT: Okay. I'll ignore that.

21 MS. MCGILLIVAY: Thank you, Your Honor.

22 THE COURT: Anything else?

23 MS. MCGILLIVAY: No, Your Honor. When
24 Mr. Van Camp is through with his designations by video,
25 Attorney Westerberg will return for our designations

1 unless Mr. Van Camp is willing to play the continuation
2 of the DVD for counter designations.

3 MR. VAN CAMP: We're certainly willing to
4 cooperate and play whatever they want. I don't know
5 whether they're going to be jumping around or whether it
6 will be long designations, but if it's jumping around,
7 I'm not sure that will speed things up. But if --

8 MS. MCGILLIVAY: I can address this. Our
9 designations on this video --

10 THE COURT: Why don't we take five minutes and
11 both sides confer on which portions of the deposition
12 you want shown. I think it would be a lot better to
13 hear it directly from Ms. Day, but I agree with
14 Mr. Van Camp that we don't want to be jumping back and
15 forth. That would be way too time consuming. Do you
16 think you can do that?

17 MS. MCGILLIVAY: Your Honor, our counter
18 designations to their designations was simply the
19 cross-examination from that video straight through
20 without interruption or jumping. It was from 86, 11 to
21 130, 10.

22 MR. VAN CAMP: I have no objection to
23 continuing to play it.

24 THE COURT: Then we can go ahead. I didn't
25 realize it was that straightforward.

1 (Video of Elizabeth Day played at 11:20-12:31 p.m.)

2 THE COURT: Let's stop right there. We'll take
3 an hour for lunch. We'll resume at 1:30. Mr. Van Camp,
4 are you going to be electronically docketing this
5 motion?

6 MR. VAN CAMP: That was a question that
7 counsel, co-counsel reminded me to ask, and --

8 THE COURT: Would you do that?

9 MR. VAN CAMP: Yes, we will do that. And also
10 just regarding the video, the video refers to exhibits
11 by the numbers of the exhibits at the time. We have the
12 trial exhibit numbers which are different and we'd be
13 happy to give that to you.

14 THE COURT: I'd like that. Do you have a copy
15 of those too?

16 MS. MCGILLIVAY: We have copy of the
17 defendant's exhibits marked with the trial exhibit
18 numbers and the deposition.

19 THE COURT: Oh, okay. Okay.

20 MR. VAN CAMP: And so if you'd like, I can give
21 you those numbers and how they correspond, and we can
22 also provide you with a copy of her report. I think
23 it's actually marked as an exhibit which has the
24 photographs and things that she's referring to. One
25 other thought: Most of them are hyperlinked on here and

1 if you want at any time, if you see a blue -- you saw
2 how some of the exhibit numbers in the transcript that
3 was -- as it was scrolling --

4 THE COURT: Just I can click on it.

5 MR. VAN CAMP: We can click on this and you can
6 see that at the time. So it just --

7 THE COURT: But if you -- do you have the
8 number of her report?

9 MR. VAN CAMP: Right. Can I just -- I'll give
10 it to you. We did two things. We marked the exhibits
11 attached to her deposition separately and those numbers
12 are D 573, 574, 575 and 576. Those are defendant
13 exhibit numbers. And I will provide you with a printed
14 copy of her trans -- I mean of her entire deposition.

15 THE COURT: Well, I have that.

16 MR. VAN CAMP: Okay. Does that have the
17 exhibits?

18 THE COURT: No, but let me see --

19 MS. MCGILLIVAY: Your Honor, the one I provided
20 for you does not have the depositions attached, if
21 that's what you're looking for.

22 THE COURT: I'm sorry?

23 MS. MCGILLIVAY: Mine does not have the
24 depositions attached to the transcripts that I marked as
25 91.

1 THE COURT: I thought that was going to happen.
2 Would you say that again?

3 MS. MCGILLIVAY: The transcript that I provided
4 this morning does not have the exhibits attached to it.

5 THE COURT: Right, right. Yes. So you think
6 it's 573?

7 MR. VAN CAMP: Yes.

8 THE COURT: That looks just like a summary.

9 MR. VAN CAMP: Right. And that's her -- okay.
10 I think -- is it 70?

11 THE COURT: There's some photographs at 576.

12 MR. VAN CAMP: Right. The numbers I gave you
13 are her exhibits.

14 THE COURT: At least this looks like
15 photographs October 18th, 2011.

16 MR. VAN CAMP: Right.

17 THE COURT: I'll look at those. If there are
18 other things, you can show them to me at 1:30. Anybody
19 else have anything else they want to bring up at this
20 time?

21 MR. VAN CAMP: Your Honor, it's 629 is the
22 report with the exhibits attached.

23 THE COURT: Oh, okay.

24 MR. VAN CAMP: Sorry that took so long.

25 (Noon recess at 12:35 p.m.)

1 I, LYNETTE SWENSON, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that
3 the foregoing is a true and accurate record of the
4 proceedings held on the 23rd day of May 2012 before the
5 Honorable Barbara B. Crabb, District Judge for the
6 Western District of Wisconsin, in my presence and
7 reduced to writing in accordance with my stenographic
8 notes made at said time and place.

9 Dated this 9th day of September 2012.

10
11
12 /s/_____

13 Lynette Swenson, RMR, CRR, CBC
14 Federal Court Reporter
15
16

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